with the trial President and the learned appeal Judge that the White Palace Bazaar is an eye-sore and a public hazard in the event of an outbreak of fire. In our view the tenant is not the kind of person who should continue to enjoy protection of the Act.

As for the reasons given by the learned appeal Judge for setting aside the order of possession we are satisfied that they are not valid reasons. The trial President did not consider the conduct of the landlords in continuing to accept rents plainly because waiver was not pleaded or argued at the trial. It is not correct for the learned appeal Judge to say that the trial President failed to consider the interest of the tenant. He referred to it in his judgment and gave reasons why he considered it reasonable to make an order of possession. As for the order directing the landlords to compensate the defendants by paying four years' rent this cannot be a ground for setting aside the order of possession. It may well be that the trial President has no power under the Act to make such an order but since the landlords who could have complained have not done so we cannot see why we should be so concerned about it.

Azmi L.P. and **Raja Azlan Shah F.J.** concurred.

Solicitors: *Oliver Phipps; Karpal Singh, Wong & Co.*

PAIDIAH GENGANAIDU v. THE LOWER PERAK SYNDICATE SDN. BHD. & ORS.

[F.C. (Ali, Ong Hock Sim and Raja Azlan Shah F.JJ.) April 25, 1974]

[Ipoh — Federal Court Civil Appeal No. 95 of 1973]

Companies — Claim on behalf of minority shareholders alleging that resolution of company is null and void — Ultra vires — Fraud on minority — Companies Act, 1965, s. 19(1)(c).

In this case the appellant, representing the minority shareholders of a private company, the first respondent, claimed for a declaration that a resolution passed at the Extraordinary General Meeting of the company was null and void on the ground that it was *ultra vires*, illegal and a fraud on the minority.

The resolution was to the effect that the second and third respondents, against whom judgment had been obtained for a wrong done to the company, were to be relieved of the liability to pay half of the judgment debt and taxed costs. The action was dismissed in the High Court and the appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) the appellant could not maintain the action unless his case fell within the two exceptions to the rule in *Foss* v. *Harbottle*,(1) that is, that the resolution was *ultra vires* and illegal and that it was a fraud on the minority;

(2) in this case the learned trial judge was right in holding that the resolution was not *ultra vires* or illegal and that it was not a fraud on the minority and therefore the appeal must be dismissed.

Cases referred to:-

(1) *Foss* v. *Harbottle* (1843) 2 Hare 461.

(2) *Edwards & Anor.* v. *Halliwell & Ors.* [1950] 2 All E.R. 1064, 1066.

(3) *Allen* v. *Gold Reefs of West Africa Ltd.* [1900] Ch. 656.

(4) *Greenhulgh* v. *Arderne Cinemas Ltd. & Ors.* [1950] 2 All E.R. 1120.

FEDERAL COURT.

M. Sivalingam for the appellant.

Ng Yook Woon for the first respondent.

A. Mahendran for the second and third respondents.

Ali F.J. (read by **Raja Azlan Shah F.J.**): This is an appeal from the dismissal of an action by the appellant, representing the minority shareholders of a private company, the first respondent.

The claim in the action is for a declaration that a resolution passed at the Extraordinary General Meeting of the company held on December 22, 1971 is null and void on the ground that it is *ultra vires*, illegal and a fraud on the minority. The resolution was in the following terms:

(i) "that the proceedings for the attachment of 9 ordinary shares of $100 each in the Lower Perak Motor Service Company Limited standing in the name of K. Krishnan (i.e. the second defendant) be stayed;

(ii) that the proceedings for the attachment of 45 ordinary shares of $100 each and 40 ordinary shares of $100 each in the Lower Perak Syndicate Sendirian Berhad (i.e. the first defendant company) standing in the names of K. Krishnan (i.e. the second defendant) and V. Thangavelu (i.e. the third defendant) respectively be stayed; and

(iii) that K. Krishnan and V. Thangavelu be allowed to settle the judgment sum of $10,345.05 and the sum of $3,063.39 taxed costs in Ipoh High Court Civil Suit No. 187 of 1970 in the sum of $6,704.22 within three months of passing this resolution."

It was passed by the majority votes of shareholders, present or by proxies. In terms of the resolution Krishnan and Thangavelu, the second and third respondents respectively, against whom judgment was obtained for a wrong done to the company, are to be relieved of the liability to pay half of the judgment debt and taxed costs.

The evidence at the trial consisted of documents in the agreed bundle and the oral testimony of the Secretary of the company who gave evidence for the appellant. The respondent elected not to adduce any evidence. Except for the Memorandum and Articles of Association nothing else seems to have any material bearing on the issue or issues in this case.

The issues, (a) that the resolution is *ultra vires*, illegal, and (b) that it is a fraud on the minority, are based on two exceptions to the rule in *Foss* v. *Harbottle*.(1) The rule was aptly stated by Jenkins L.J. in *Edwards & Another* v. *Halliwell & Others*(2) in these words:

"The rule in *Foss* v. *Harbottle*,(1) as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*."

In terms stated the appellant cannot maintain the action unless his case falls within either of two exceptions which were referred to by Jenkins L.J. in his judgment on page 1067 as follows:

"where the act complained of is wholly *ultra vires* the company or association the rule has no application because there is no question of the transaction being confirmed by any majority. It has been further pointed out that where what has been done amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."

The appellant's case so far as it is based on the first exception was argued on the basis that the amount of the judgment debt represents capital which the company has no power to reduce. The answer to this is that paragraph 5 of the Memorandum clearly gives the company power to increase or reduce capital. I am not, however, convinced that the judgment debt is capital. Plainly the effect of the resolution is that the company would have to write-off half of the judgment debt and taxed costs and the question is whether it has the power to do this. In my view it has. The Third Schedule to the Companies Act, 1965 which applies by reason of section 19(1)(c) and also by reason of paragraph 3(22) of the Memorandum sets out the powers of the company in addition to those mentioned in the Articles. The powers in paragraphs 12 and 21 of the Schedule seem wide enough to authorise the company to act in terms of the resolution. On the question of illegality, it has not been shown that the said action is illegal under the Act. For these reasons I respectfully agree with the learned trial judge that the resolution is not *ultra vires* or illegal.

On the second exception the appellant has submitted that the resolution not being *bona fide* for the benefit of the company as a whole is a fraud on the minority. In *Allen* v. *Gold Reefs of West Africa, Limited*[3] Lindley M.R. said on page 671:

"Wide, however, as the language of section 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and it must not be exceeded."

The expression "*bona fide* for the benefit of the company as a whole" in the context stated would seem to mean something more than writing-off bad debts as in this case. What is beneficial to the company as a whole is usually a matter for the shareholders to decide. Largely it is a matter of opinion. Where opinions differ, as might well be the case here, the opinion of the majority must, of course, prevail. This is because the minority have by their contract with the company agreed to submit to the will of the majority. In the instant case and other similar cases it is not always easy to know as a fact whether or not a particular resolution is or is not *bona fide* for the benefit of the company as a whole in order to establish that it is a fraud on the minority. The practical approach to this problem was formulated by Evershed M.R. in *Greenhalgh* v. *Arderne Cinemas Ltd. and Others*[4] when he said on page 1126 thus:

"Certain things, I think, can be safely stated as emerging from those authorities. In the first place, it is now plain that '*bona fide* for the benefit of the company as a whole' means not two things but one thing. It means that the shareholder must proceed on what, in his honest opinion, is for the benefit of the company as a whole. Secondly, the phrase, 'the company as a whole' does not (at any rate in such a case as the present) mean the company as a commercial entity as distinct from the corporators. It means the corporators as a general body. That is to say, you may take the case of an individual hypothetical member and ask whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit. I think the thing can, in practice, be more accurately and precisely stated by looking at the converse and by saying that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders so as to give to the former an advantage of which the latter were deprived. When the cases are examined where the resolution has been successfully attacked, it is on that ground that it has fallen down. It is, therefore, not necessary to require that persons voting for a special resolution should, so to speak, dissociate themselves altogether from the prospect of personal benefit and consider whether the proposal is for the benefit of the company as a going concern. If, as commonly happens, an outside person makes an offer to buy all the shares, *prima facie*, if the corporators think it is a fair offer and vote in favour of the resolution, it is no ground for impeaching the resolution because they are considering the position of themselves as individual persons."

This was also the approach adopted by the learned trial judge in the instant case. Whatever may have been stated by him in coming to his conclusion, I think it is impossible to say that the resolution, as it stands, has the effect of discriminating between the majority shareholders and the minority shareholders to the detriment of the latter. There is nothing in the resolution which can suggest that the majority shareholders being in control of the company were taking advantage of their position to deprive the minority shareholders of their individual rights of membership. The minority shareholders' action in *Greenhalgh's*[4] case failed even though the special resolution complained of there would seem to discriminate against the minority. On the view which I take of the resolution in the present case, it must be held that it is not a fraud on the minority. The learned trial judge was right in his conclusion and this appeal must, therefore, be dismissed with costs here and below.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Lim Kean Chye & Co.; Yook Woon & Yeow; Mahendran & Co.*

CHIK BINTI ABDULLAH v. ITAM BINTI SAAD

[F.C. (Suffian C.J., Ali and Raja Azlan Shah F.JJ.) April 27, 1974]

[Alor Star — Federal Court Civil Appeal No. 18 of 1974]

Land Law — Contract for sale of land — Claim for specific performance — Conflicting equities.

In this case the land in dispute belonged to one Abdullah bin Mohamed. After his death his widow, Mek, became administratrix of his estate. She entered into an agreement to sell the land to the respondent, for $150 which she had previously borrowed from her. After the death of Mek, the appellant became the administratrix *de bonis non* of the estate. The respondent claimed specific performance of the contract of sale but this was resisted by the appellant on the ground